Supreme Court, U.S.
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No. 03-874

In The Supreme Court of the United States

BONNIE L. GEISSAL,
AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF JAMES W. GEISSAL,

Petitioner,

v.

MOORE MEDICAL CORP.; GROUP BENEFIT PLAN
OF MOORE MEDICAL CORP.; HERBERT WALTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Moore Medical Corp. has no parent corporation. As of April 11, 2002, Heartland Advisors, Inc., an institutional investor, owned 13% of the outstanding stock of Moore Medical Corp. No other publicly held company owns more than 10% of Moore Medical Corp.

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I. INTRODUCTION

Respondents ask that this Court reject the Petition for Writ of Certiorari. As will be briefly shown below, Petitioner has misrepresented the facts and misstated the law. When the facts and law are accurately presented, this case satisfies none of the considerations governing review on certiorari set forth in Supreme Court Rule 10. Under Supreme Court Rule 14.4, the Petitioner's failure to present, with accuracy and clarity, whatever is essential to a ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny its Petition.

Moreover, the Petitioner does not contest the Eighth Circuit's holding that the Petitioner is, except possibly on two remanded claims not ripe for appeal, entitled to no recovery because the Moore Plan[1] provides that "benefits are not payable for . . . services for which there is no obligation to pay." *Geissal v. Moore Medical Corp., et al.*, 338 F.3d 926, 932 (8th Cir. 2003). Instead, the Petitioner submits a baseless claim for recovery on behalf of non-parties who, as direct claimants, would not be entitled to an ERISA recovery. Petition, pp. 8, 10, 11, 12-16.

II. STATEMENT OF THE CASE

Inasmuch as the Petitioner's presentation of the facts is misleading, Respondents ask that this Court substitute

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[1] In this brief, the Group Benefit Plan of Moore Medical Corp. will be called the "Moore Plan." Moore Medical Corp. will be called "Moore." The TWA Group Medical Plan will be called the "TWA Plan."

the Eighth Circuit's concise and accurate Background statement. *Geissal,* 338 F.3d at 929-930.

III. REASONS FOR DENYING THE PETITION

A. Petitioner's Failure to Act on the Eighth Circuit's Remand

The Eighth Circuit affirmed the district court's results in all respects except that it remanded two questions for further consideration: whether the estate should, under the Moore Plan, recover (1) the $4,425 in health care expenses which remained unreimbursed under the TWA Plan and (2) approximately $9,000 in expenses for cancer treatments in Greece not presented for payment to the TWA Plan. The Eighth Circuit directed remand on July 31, 2003. *Id.* at 936. Although the Petition states that the "question posed by this Court in its footnote 3 in *Geissal I* . . . was never answered by the district court," it fails to add that the question has not been answered because Petitioner has failed to act on the remand. Petition, p. 9.

B. Petitioner's Misrepresentations of Fact

Petitioner's statements that the Moore Plan was primary are unsupported by the record. Petitioner's arguments are based on unsupported assertions that the Moore Plan was primary. *See, e.g.* Petition, pp. 11, 14, 15, 17. Nothing in the record establishes which of the Plans was the primary insurer and which secondary. The Petitioner's claim that TWA Plan is secondary is misleading. *Id.*, p. 14. The Eighth Circuit did not find which of the two Plans was primary and which secondary. It did find that, as a matter of fact, the TWA Plan had acted as the primary insurer and that it had paid all submitted medical expenses of Mr.

Geissal, other than expenses totaling $4,425 not covered under the TWA Plan. *Geissal,* 338 F.3d at 929-930.

Respondents did not "secretly" hold up payment of $104,458.34. Petitioner claims that Respondent Moore "secretly" held up payment of $104,4587.34 [*sic*; presumably, $104, 458.34] of Mr. Geissal's medical bills during the first six months of the COBRA period. Petition, pp. 6, 10, 20. This claim is false. In the district court, Respondents introduced uncontradicted evidence that the unpaid bills as of January 20, 1994 (one week before Moore rescinded Geissal's COBRA coverage) totaled $8,200. J.A.[2], p. 0792. The Eighth Circuit found that, as a matter of fact, all of Mr. Geissal's medical expenses had been paid, with the possible exception of the two items remanded to the district court. *Geissal,* 338 F.3d at 929-930.

There was no "fraudulent taking," "defalcation," or other intentional violation by Respondents. Petitioner's allegations that Respondents engaged in "fraudulent taking," "defalcation" and other intentional violations (Petition, pp. 11, 19 and 21) are not substantiated by the record. Nothing in the record supports Petitioner's suggestions that Moore never intended to give Mr. Geissal COBRA coverage and that it gave him a COBRA notice to dissuade him from filing age and disability claims with the Equal Employment Opportunity Commission. *Id.*, pp. 11, 20.

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[2] J.A. refers to the Joint Appendix filed in the Court of Appeals.

C. Petitioner's Misstatements of Law

There is no ERISA-recognized "doctrine of negative restitution." The Petitioner states that the Eighth Circuit misapplied the "doctrine of negative restitution." *Id.*, p. 12. Respondents searched the combined Federal courts database in Lexis and were unable to find a case referring to such a doctrine. Petitioner claims that the Seventh Circuit found it be a "valid ERISA and remedies concept" in *Reich v. Continental Casualty Co.*, 33 F.3d 754 (7th Cir. 1994). Petition, pp. 12-13. The *Reich* court discusses "negative unjust enrichment" as a corollary of the concept of unjust enrichment. In *Reich*, the party seeking restitution was the plaintiff, while in the present case the Petitioner seeks "negative restitution" not for the plaintiff (itself) but for the providers and the TWA Plan, who are not parties to this suit.[3] Significantly, Petitioner objected to Respondents' effort in the district court to join the TWA Plan as a party (J.A., pp. 0072-0074), and the TWA Plan has made no claim against the estate. *Geissal*, 338 F.3d at 933, note 3. Although its counsel wrote to providers advising that the Moore Plan was (in his view) responsible for their undiscounted bills, the parties have stipulated that no provider has asserted a claim. J.A. pp. 0569, 0315, Stipulations 27-29. As the Eighth Circuit correctly pointed out, the providers

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[3] Petitioner argues that it should be entitled to a "negative restitution" recovery under ERISA to be held in constructive trust on behalf of parties who, under *Mertens v. Hewitt & Associates*, 508 U.S. 248 (1993), would not be entitled to recover as ERISA claimants on their own behalf and that the Petitioner should be entitled to recover on their behalf precisely *because* they are not entitled to recover as ERISA claimants on their own behalf. Petition, pp. 11, 14-15. This argument is a curious "negative a fortiori."

and the TWA Plan could have, but did not, assert claims against the estate. *Geissal*, 338 F.3d at 933, note 3. Moreover, counsel for the estate does not represent the medical providers or the TWA Plan, and they have no standing to appeal.

The Eighth Circuit correctly applied Knudson. Petitioner claims that the Eighth Circuit rejected the principle of equitable restitution that this Court articulated in *Great-West Life & Annuity Insurance Company, et al. v. Knudson*, 534 U.S. 204 (2002). Petition, p. 10. The Petitioner has misstated the decision of the Eighth Circuit, which correctly applied *Knudson* in finding that the Respondents held no *res* of the Petitioner, a fact never questioned by Petitioner. As the Eighth Circuit stated, "Here, any unjust enrichment of the Moore Plan resulted from benefits indirectly conferred by third parties, not by Geissal or his estate." *Geissal*, 338 F.3d at 932. Contrary to the Petitioner's argument (Petition, p. 11), nothing in the Eighth Circuit's opinion constituted "social legislation by its judicial amendment of ERISA to allow the a [*sic*] dual coverage secondary plan that suffered loss due to Respondents' defalcation, to sue the Respondents . . . " The court did not find the TWA Plan to be the secondary plan and it did not "allow" (or disallow) any such right to sue under ERISA. Contrary to the Petition, nothing in the Eighth Circuit's opinion "legislatively [*sic*] creates new causes of action for new parties in addition to those allowed in 29 U.S.C. §1132(a)." Petition, p. 12.

IV. CONCLUSION

Certiorari is not warranted. For the reasons set forth above, the Respondents request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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